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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION**

RUSSELL J. MORRIS)	
)	
Plaintiff,)	
)	
vs.)	Case No. 04-6093-CV-SJ-GAF
)	
CITY OF CHILLICOTHE, et al.)	
)	
Defendants.)	

ORDER

Presently before the Court is a Motion for Summary Judgment filed pursuant to Fed. R. Civ. P. 56(c) by Defendants Richard L. Knouse, D. John Edwards, Charles Haney, Earle Teegarden, Maurice Zion, Pam Jarding, and the City of Chillicothe, Missouri (collectively "Defendants"). (Doc. #86). The Plaintiff, Russell J. Morris ("Morris"), was formerly employed as a police officer in the Chillicothe Police Department. *Id.* Morris alleges Defendants violated his First Amendment rights of free speech and association by terminating him after he complained of problems within the department and retained legal counsel.¹ *Id.* Defendants claim summary judgment is proper because Morris cannot establish a First Amendment violation and the City's interests outweigh any right Morris might have because Morris created distrust and chaos within the department. (Doc. #87-1). Defendants also claim the individual Defendants are entitled to qualified immunity. *Id.* Morris opposes summary judgment, arguing there are genuine issues of material fact as to whether he was discharged in retaliation for exercising his First Amendment rights.

¹Morris seeks relief pursuant to 42 U.S.C. § 1983.

(Doc. #101-3). For reasons set forth below, the Defendants' Motion for Summary Judgment is GRANTED.

DISCUSSION

I. Facts

This case arises from Morris' termination from the Chillicothe Police Department on April 8, 2004. (Doc. # 68). Morris was initially hired January 12, 1998 to work as a police officer in the Chillicothe Police Department. *Id.* At the time he was terminated, Morris was a Sergeant in that department. *Id.* During his time in the department, Morris experienced some performance issues, including difficulty resolving conflicts with other employees and ranking in the bottom third for the number of traffic stops for the department over the last four years of his employment. (Morris Dep. 16:1-3; 68:7-15). In 2002, Captain Roy Akerson issued a Letter of Discussion to Morris regarding Morris' possible misuse of sick time. (Morris Dep. 42:11-44:5; Ex. 506A). In an Employee Performance Appraisal given March 27, 2003, Morris was advised he needed "to be more responsible in the image he is reflecting to others in the department on the production of work and accountability for covering his shift." (Edwards Decl. ¶6; Knouse Decl. ¶6; Ex. 507). Later in 2003, Morris was reprimanded for attending only half of the training sessions at a training conference the department paid for him to attend.² (Morris Dep. 36:18-37:24).

Morris also experienced problems with other people in the department. (Doc. #87-1). The City's Personnel Policies Handbook states that an employee could be disciplined or terminated for any disruptive behavior, making false or malicious statements concerning any employee or its officers, and making

²Morris claims he notified the department he would only attend those sessions in which he had no prior training. (Morris Dep. 41:20-42:2).

defamatory, libelous or slanderous statements about the City, any coworker, or member of management. (Morris Dep. 50:13-51:9; 56:21-57:15; Ex. 500 and 501). Despite admitting that violations of this policy would justify termination and that the department considered the spreading of rumors to be disruptive, Morris told the police chief that another officer had taken bribes without knowing whether the accusation was true or false. (Morris Dep. 56:21-58:11; 89:4-21; 21:15-22:1). He also told his fellow officers that the office manager, Cindy Hanavan ("Hanavan"), presented the image of someone who would sleep around. (Morris Dep. 17:8-9; 161:23-162:4). Additionally, another officer allegedly heard Morris joking with other officers about Hanavan having affairs with other members of the Chillicothe Police Department. (Sackrey Dep. 124:5-125:22).

By February 2004, rumors in the department created lack of trust between the officers and the level of teamwork deteriorated. (Morris Dep. 115:4-16; Ex. 511). The chaos in the department endangered the department's ability to protect and serve the public as morale was low and some officers did not want to work with others. (Morris Dep. 223:11-20; 103:15-25). At a meeting that occurred some time between February 10 and February 27, 2004, Chief Knouse and Edwards called City Attorney Bosler ("Bosler") into a meeting in which they discussed demoting Morris to road officer. (Bosler Dep. 16:9-14). Bosler asked what information supported demotion and Chief Knouse recounted general performance complaints. (Bosler Dep. 16:21-25). Edwards stated he did not have as much documentation as he would like, but advised Bosler of the documented incidences. (Bosler Dep. 16:25-17:7). Upon eliciting Chief Knouse's assessment that Morris was not a good employee, Bosler recommended that Morris be terminated for excessive use of sick time, tardiness, and starting rumors within the department. (Bosler Dep. 17:8-21:21;

6-12). Within a few weeks of that meeting, Morris had six complaints lodged against him.³ (Doc. #87-1). Sometime after March 1, 2004, Officer Mueller submitted a formal complaint regarding Morris for “conduct that is unbecoming a supervisor, namely spreading rumors.” (Morris Dep. 20:16-21:9; Ex. 522). At a March 2, 2004 meeting, other officers made derogatory comments about Morris, but Chief Knouse took no disciplinary action against those officers, so Morris decided he needed to retain counsel. (Morris Dep. 223:21-224:14; Knouse Dep. 153:14-17). On March 19, 2004, Officer Bagley submitted a memo to a supervisor claiming Morris failed to perform his duties to such a degree that Morris was “a liability to this department, to his fellow officers.” (Morris Dep. 13:4-14:7; Ex. 521). On March 22, 2004, Officer Welch complained Morris would disappear while on duty and be slow to respond to calls. (Morris Dep. 29:204-30:21; Ex. 524). Officer Welch also complained that Morris spread rumors, which he felt was conduct unbecoming a police officer, particularly one charged with supervising others. *Id.* That same day, Officer Berry complained of Morris’ alleged failure to perform his duties. (Kirkendoll Decl. ¶6; Ex. 525).

On March 23, 2004, Chief Knouse sent a letter to Edwards requesting that Morris be reduced in rank due to the numerous grievances filed against him. (Morris Dep. 33:10-15; Ex. 526). The complaints continued with Hanavan filing one on March 27, 2004 and Donna George alleging March 29, 2004 that Morris stirred rumors into fantastic stories, causing “many hard feelings and a lot of trouble within our department.” (Morris Dep. 160:18-162:4; Ex. 530; Hanavan Decl. ¶6; George Decl. ¶6; Ex. 532). On March 29, 2004, the city council met to discuss personnel issues related to Morris and another officer. (Knouse Dep. 125:23-25). Chief Knouse recommended that Morris be reduced in rank and Edwards

³Morris claims all the complaints were fabricated and notes they were not filed contemporaneously with the allegations made therein. (Doc. #101-3).

concurrent. (Knouse Dep. 128:23-25; Edwards Dep. 34:11). Although some members were inclined to terminate Morris, the council voted to suspend Morris rather than terminate pending a meeting with Chief Knouse and City Administrator Edwards to discuss his employment situation. (Jarding Dep. 18:3-18; Zion Dep. 5:2-24; Teegarden Dep. 18:15-18; Knouse Dep. 130:22-131:2). On March 29, 2004, Chief Knouse suspended Morris with pay. (Knouse Decl. ¶9; Ex. 533).

Sometime before April 1, 2004, Chief Knouse instructed Morris to attend a meeting with Edwards and himself on April 1, 2004, but Morris failed to attend. (Morris Dep. 148:14-150:10; Ex. 537). Defendants considered Morris' failure to attend to be disobeying a direct order from Chief Knouse. (Morris Dep. 148:14-150:10; Ex. 537). Morris claims Chief Knouse called the meeting with Morris and the other officer after learning that the two officers had retained the same attorney. *Id.* Morris also claims he did not attend because his counsel could not be present, but that his counsel sent a letter to City Attorney Bosler on March 30, 2004, before the scheduled meeting, to attempt to schedule a time when his counsel could be present. *Id.* Although the members of the City Council apparently had no objection to Morris' attorney attending the meeting with Chief Knouse and Edwards, Bosler has indicated that the attorney's scheduling conflicts were irrelevant as neither Bosler nor Morris' attorney were invited to the meeting. (Douglas Dep. 36:8-12; Jarding Dep. 34:25-35:13; Ex. 537).

The same day Morris failed to attend that meeting, the city council repealed and struck from the prior minutes all action related to Morris that occurred at the March 29, 2004 meeting and voted to "give the City Administrator the authority to take, in his solo [sic] discretion, employment disciplinary action against Russ Morris including, but not limited to, resignation with a severance package of \$3,196.60." (Frampton Decl. ¶7; Ex. 539). Three council members voted to give Edwards the authority to end Morris'

employment.⁴ Council member Jarding (“Jarding”) states she voted to give Edwards the authority because Morris failed to attend a scheduled meeting. (Jarding Decl. ¶4). Council member Teegarden’s (“Teegarden”) vote was purportedly based Bosler’s recommendation regarding Morris’ poor performance. (See Teegarden Dep. 18:10-18). Council member Zion (“Zion”) testified he voted to give Edwards the authority to take action because he believed Morris disrupted the department, affecting the safety of the other officers and the community. (See Zion Dep. 5:25-6:6). After rejecting the City’s offer to resign and receive severance, Morris was dismissed for “Dereliction of Duty, Insubordination, & Creating a hostile work environment.” (capitalization in original) (Morris Dep. 151:21-152:5; Ex. 543).

Morris questions the council members’ explanation for his termination. (Doc. # 101-3). Morris contends the council improperly called the April 1, 2004 meeting to retaliate against him for hiring an attorney. *Id.* Morris claims the council was informed at that meeting that Morris had retained an attorney and that this was the only additional information presented to the council that would support termination. (Doc. #101-3). However, the members of the council do not recall getting any new information between the March 29, 2004 and the April 1, 2004 meetings regarding Morris retaining counsel. (Douglas Dep. 35:21-36:3; Jarding Dep. 34:7-19; 19:14; Teegarden Dep. 19:15-20:4). In fact, Teegarden believes he knew Morris had retained an attorney at the first meeting, at which the council voted to suspend pending the meeting with Chief Knouse and Edwards. (Teegarden Dep. 19:24-25). As further evidence of improper motive, Morris notes that upon learning that Morris had retained an attorney, Chief Knouse sent an e-mail

⁴Councilman Haney was absent from the April 1, 2004 meeting and Councilman Douglas abstained. (Haney Dep. 26:1-27:12; Douglas Dep. 17:8-14).

to the entire department advising that no one in the department was to speak to him regarding department or city matters as all communication regarding those issues should be through the city attorney. (Pl. Ex. 21).

Believing he was terminated in violation of his First Amendment rights of free speech and free association, Morris filed the present action. (Doc. #68). Morris has abandoned his free speech claim in light of the United States Supreme Court decision in Garceetti v. Ceballos, — U.S. —, 126 S.Ct. 1951 (2006), in which the Court found an employee's statements made pursuant to his official duties were not made as a citizen for First Amendment purposes, and therefore, were not insulated from employer discipline. (Doc. #101-3). However, Morris maintains he was discharged in retaliation for retaining legal counsel related to his employment issues. *Id.* Morris characterizes his right to retain counsel as the right of association, or alternatively, as the right to access the courts and seeks to recover damages under § 1983. *Id.* Defendants argue that the sequence of events and Morris' conspiracy argument leave no genuine issue of material fact with respect to Morris' claim for retaliatory discharge based on his retention of counsel. (Doc. #104-1). Defendants also argue Morris has not pled a claim for violating his right of access to the courts and cannot do so now. *Id.*

II. Standard

Defendants filed this Motion for Summary Judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. According to this Rule, summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When considering this Motion, the Court views all facts in the light most favorable to Morris and gives him the benefit of all reasonable inferences. See Prudential Ins. Co. v.

Hinkel, 121 F.3d 364, 366 (8th Cir. 1997). The Court will not weigh the credibility of the evidence, but rather will focus on whether a genuine issue of material fact exists for trial. Roberts v. Browning, 610 F.2d 528, 531 (8th Cir. 1979); United States v. Porter, 581 F.2d 698, 703 (8th Cir. 1978).

An issue of material fact is “genuine” if “the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party.” See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). The “materiality” of a disputed fact is determined by the substantive law governing the claim. Anderson, 477 U.S. at 248. “Disputes over facts that might affect the outcome of the lawsuit according to applicable substantive law are material.” Liebe v. Norton, 157 F.3d 574, 578 (8th Cir. 1998) *citing* Anderson, 477 U.S. at 248.

Defendants bear the burden of proving the absence of disputed material facts. See Prudential Ins. Co., 121 F.3d at 366. The burden then shifts to Plaintiff to “set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). To survive summary judgment, Morris must make a sufficient showing of every essential element of his claim, on which he bears the burden of proof. Osborn v. E.F. Hutton & Co., Inc., 853 F.2d 616, 618 (8th Cir. 1988). The summary judgment rule is intended “to isolate and dispose of factually unsupported claims” and should be applied to accomplish this purpose. Prudential Ins. Co., 121 F.3d at 366. In the interest of promoting judicial economy, summary judgment should be granted to prevent the trial of cases lacking a genuine issue of material fact. Inland Oil and Transp. Co. v. U.S., 600 F.2d 725, 728 (8th Cir. 1979).

III. Analysis

A. Freedom of Association

Although Morris has abandoned his free speech claim, he maintains that his termination violates his freedom of association. (Doc. #101-3). The First Amendment restrains the government from retaliating against a public employee based on the employee's speech or associations. Hughes v. Whitmer, 714 F.2d 1407, 1418 (8th Cir. 1983) *citing* Perry v. Sinderman, 408 U.S. 593 (1972). To establish a claim for unlawful First Amendment retaliation under 42 U.S.C. § 1983, a public employee must show "that his conduct was constitutionally protected, and the protected conduct was a substantial or motivating factor in the defendant's action that resulted in dismissal." Green v. St. Louis Hous. Auth., 911 F.2d 65, 70 (8th Cir. 1990). That is, the employee must establish a causal connection between the protected activity and the adverse employment action. Bechtel v. City of Belton, Mo., 250 F.3d 1157, 1162 (8th Cir. 2001). Whether the protected activity was a motivating factor is a question of fact, but the sufficiency of the evidence to create an issue of fact is a question of law. de Llano v. Berglund, 282 F.3d 1031, 1036 (8th Cir. 2002) *citing* Cox v. Miller County R-I Sch. Dist., 951 F.2d 927, 931 (8th Cir.1991).

In the present case, Defendants do not dispute that Morris had the right to retain counsel, so the sole issue is whether there is a genuine issue of material fact with respect to the reason for his termination. Morris claims Defendants discharged him in retaliation for retaining an attorney to help him with his personnel issues. Defendants argue Morris was terminated for performance issues that began long before Morris sought the advice of counsel. In support of this Motion, Defendants submitted unrefuted evidence that Morris had performance issues that predate his protected association with an attorney. Defendants have also presented evidence that those performance issues disrupted the police department and jeopardized the department's ability to protect the public. In March, several officers in the department filed complaints about Morris spreading rumors and shirking his duties. While the timing and similarity of those

complaints are suspect, that they occurred prior to Morris retaining an attorney undermines Morris' claim that he was discharged in retaliation for associating with an attorney. As Morris' own allegations of a conspiracy to terminate him contradict his assertion that he was fired for hiring an attorney, Morris has failed to present facts from which a reasonable jury could conclude that his associating with an attorney was a substantial or motivating factor for his termination.

In addition to evidence of alleged performance problems, Defendants have submitted evidence that the City Council authorized termination based on Morris' performance record and the disruption it allegedly caused. Three council members voted to give Edwards the authority to end Morris' employment. Jarding states that she voted to give Edwards the authority because Morris failed to attend a scheduled meeting. Teegarden's vote was purportedly based on Bosler's recommendation regarding Morris' poor performance. Finally, Zion testified he voted to give Edwards the authority to take action because he believed that Morris disrupted the department, putting the safety of the other officers and the community at risk. Morris offers no evidence to contradict Defendants' contention that insubordination, poor performance, and the disruption to the department motivated their votes to terminate. Moreover, the council had already indicated an inclination to terminate Morris at the March 29, 2004 meeting, based at least in part on the recommendation of Bosler, who recommended termination as early as February 2004. After Morris missed the meeting in April, Edwards dismissed him for dereliction of duty, insubordination, and creating a hostile work environment.

In contrast to Defendants' evidence that Morris was terminated related to his performance, Morris fails to provide any evidence to show that his retention of an attorney was a substantial or motivating factor for his termination. Morris offers little more than speculation and conjecture to make the required

connection between his termination and his obtaining the services of an attorney. Morris' claim of retaliatory discharge rests entirely on an inference drawn from the fact that his termination occurred after he retained his attorney. Morris contends that the council changed its vote after discovering he hired an attorney, but has not produced any evidence to support that claim other than the timing itself.

Although the Eighth Circuit's precedent on the issue is not entirely settled, generally more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation. Green v. Franklin Nat'l Bank of Minneapolis, 459 F.3d 903, 915 (8th Cir. 2006) *discussing* Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1136 (8th Cir. 1999). This is particularly true when the plaintiff has engaged in intervening unprotected conduct. *Id.*

In Kiel, the Eighth Circuit determined summary judgment was proper when an employee who requested equipment to accommodate his disability was terminated after engaging in disruptive behavior following the request. Kiel, 169 F.3d at 1136. The Eighth Circuit determined that the plaintiff's unprotected conduct "eroded any causal connection that was suggested by the temporal proximity of his protected conduct and his termination." *Id.* The same is true here as the evidence suggests that Defendants took very seriously Morris disobeying the order to attend the meeting to discuss his employment status. Without any evidence of retaliatory motive, Morris infers one from the timing of the decision to terminate. However, such "a mere coincidence of timing can rarely be sufficient to establish a submissible case of retaliatory discharge." Kipp v. Mo. Highway and Transp. Comm'n., 280 F.3d 893, 897 (8th Cir. 2002) *quoting* Nelson v. J.C. Penney Co., 75 F.3d 343, 346-47 (8th Cir. 1996).

Aside from his speculation regarding the timing of events, Morris has no evidence of any conduct or statement that indicates his retention of an attorney played any part in the council's decision to terminate

him. In an attempt to establish a causal connection, Morris cites Haney's statement in his deposition that the council was told Morris had an attorney as evidence that, "At the April 1 meeting the City Council was informed that Morris had retained attorney Hagerdon." (Doc. #101-3). However, the only meeting discussed in the cited portion of Haney's deposition is the one on March 29, 2004. (Haney Dep. 46:8-18). In fact, Haney was not even present at the April 1, 2004 meeting, so he could not have been told at that meeting that Morris had an attorney as Morris claims. Morris also cites Teegarden's deposition to show the council was retaliating for Morris hiring an attorney, but Teegarden expressed his belief that Morris had retained an attorney before the first meeting, at which the council voted to suspend rather than terminate.

These statements are simply inadequate support for Morris' claim that the only new information the council was told at the second meeting was that Morris had retained an attorney. On the contrary, the record indicates the members of the council do not recall getting any new information between the first and second meetings regarding Morris retaining counsel. It is Morris' burden to present evidence sufficiently supporting disputed material facts that a reasonable jury could return a verdict in his favor. Jackson v. Arkansas Dep't of Educ., 272 F.3d 1020, 1025 (8th Cir. 2001). He has failed to do so. Morris offers only uncorroborated claims and speculation of a retaliatory motive. This fails to provide the required nexus between his retention of counsel and his termination.

The only indication that any defendant paid any attention to Morris' retention of counsel was Chief Knouse's general e-mail to the police department advising them that Morris had counsel and that all communications with Morris should proceed through the city attorney. This is simply insufficient to create a reasonable basis for finding Morris' termination was based on a violation of his First Amendment rights. As there is no basis upon which a reasonable jury could find that Morris hiring an attorney was a substantial

or motivating factor in his termination, Morris has failed to establish a prima facie case of retaliation and Defendants are entitled to judgment as a matter of law.

B. Right of Access

In addition to claiming a violation of his right of association, Morris takes the rather novel position that Defendants terminated his employment in retaliation for hiring an attorney in an attempt to prevent him from gaining access to the courts in violation of his right to petition the government. (Doc. #101-3). Defendants argue Morris did not raise this theory in his first amended Complaint. (Doc. #101-4). The Court agrees that Morris has not pled a right-of-access claim and cannot do so in response to a motion for summary judgment.

Even if Morris' general references to the First Amendment in his first amended Complaint would provide Defendants with sufficient notice of such a claim, Morris' access claim fails for the same reasons his association claim fails—he provides no evidence of improper motive. To prevail on a right-of-access claim, Morris must show that Defendants acted with some intentional motivation to restrict his access to the courts. Scheeler v. City of St. Cloud, Minn., 402 F.3d 826, 830 (8th Cir. 2005) *citing* Whisman v. Rineare, 119 F.3d 1303, 1312-12 (8th Cir. 1997) (right-to-access claim requires proof of government action “designed” to prevent access to the courts).

Reviewing the record in the light most favorable to Morris, the Court finds nothing to indicate Defendants intentionally conspired to keep Morris out of court. Morris contends the council was told of his representation following his suspension and then voted to terminate. However, Morris has not set forth any facts in support of this contention or to controvert Defendants' claim that they terminated Morris for insubordination, poor performance, and disruption he allegedly caused in the department. As such, Morris

simply fails to provide any evidence upon which a reasonable jury could find that he was terminated as a result of an intentional motivation to deny him access to the courts.

CONCLUSION

Morris has abandoned his First Amendment free-speech claim and has failed to prove his First Amendment freedom-of-association claim. Morris has not produced any facts in support of his contention that his hiring an attorney was a substantial or motivating factor in his dismissal. Further, Morris failed to plead or provide evidentiary support for his right-of-access claim. As no genuine issue of material fact exists for trial, Defendants' Motion for Summary Judgment is GRANTED.⁵

IT IS SO ORDERED.

/s/ Gary A. Fenner
GARY A. FENNER, JUDGE
United States District Court

DATED: November 1, 2006

⁵Having determined Morris has failed to establish a prima facie case of retaliatory discharge, the Court does not reach Defendants' claims of immunity.